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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-314

OLLIE T. HILL, *et al.*,
Petitioners,

v.

WESTERN ELECTRIC CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Respondent opposes the Petition for a Writ of Certiorari because the decision below correctly applied established principles to the facts of the case, and does not conflict with decisions of other circuit courts.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether, under this Court's decision in *East Texas Motor Freight, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), named plaintiffs who are present and former employees and suffered no discrimination in hiring can represent a class of rejected applicants for employment alleging discrimination in hiring.

Whether, in a case where promotions were uniformly made to more experienced employees and where the parties stipulated that the skills required for promotion were normally gained through experience, Petitioners presented a *prima facie* case of discrimination in promotions by relying solely upon statistical evidence that did not take experience or qualifications into account.

COUNTERSTATEMENT OF THE CASE

This case was brought as a class action, alleging race and sex discrimination in employment, by eight present and former employees of Respondent who worked at two facilities in Arlington, Virginia. None of the eight named plaintiffs had ever been refused employment by Respondent. On October 31, 1975, based in part upon Plaintiffs' express representation that none of them was or had been a rejected applicant, the district court for the Eastern District of Virginia certified a class that excluded applicants for employment. On November 14, 1975, the court *sua sponte* reversed itself and allowed this case to proceed as a class action involving both present and former employees and rejected applicants.[1] In both certification decisions, the district court overruled Respondent's contention that class membership should be limited to those employees whose claims were not barred by the statute of limitations, and certified a class dating back to the effective date of Title VII of the Civil Rights Act of 1964.

[1] The District Court explained its reversal in the following letter to counsel:

> A closer reading of *Barnett* v. *W. T. Grant Co.*, 518 F. 2d 543 (4th Cir. 1975), convinces me that I was in error in my ruling on October 31, 1975, that the class should not include applicants for employment. Counsel drafting the order on the October 31st ruling should certify a class including applicants for employment. I am sorry if this change in ruling has delayed any discovery proceedings.

After trial on the merits, the district court sustained claims of discrimination in hiring and promotion. The trial court found that Respondent's hiring practices had not had a disparate impact upon minorities or females when compared with census statistics for the Washington, D.C. Standard Metropolitan Statistical Area.[2] However, the court found disparate impact in hiring during the entire 1965 to 1975 period by comparing Respondent's hiring percentages with applicant flow statistics for the years 1970-1974.[3] On this basis, the court ordered preferential hiring for all rejected applicants from 1965 to date, and further ordered that Respondent fill all new vacancies in its facilities in accordance with a specified numerical hiring ratio until such time as Respondent's work forces contained percentages of minorities and females equal to their percentages in the applicant pool for the preceding four (4) years.[4]

Plaintiff's sole proof of disparate impact in promotions consisted of a comparison between the minority and female percentage of Respondent's hourly work forces with the number of minorities and females promoted, despite stipulated and uncontroverted evidence that promotion skills were normally gained through experience

[2] Appendix to Petition, at 31a.

[3] These statistics proved that Respondent attracted minority and female applicants far in excess of their expected availability. For example, SMSA availability statistics for blacks, from 1965 to 1974, ranged from 22.5% to 26.5%, while Respondent's black applicant flow from 1970-1974 exceeded 40% for both facilities. Appendix to Petition 30a, 32a. The district court found that Respondent had engaged in affirmative efforts to recruit and hire blacks, Appendix to Petition, at 43a, note 7, and while it recognized that such efforts could have the effect of distorting the applicant pool for a given employer, it found without further explanation or citation that Respondent's efforts did not preclude reliance upon applicant flow statistics. Appendix to Petition, at 33a, note 4.

[4] Appendix to Petition, at 96a-97a, 99a-101a. No specified time limit for such ratio hiring was established.

and that promotions were uniformly allocated to more experienced employees.[5] Once again, the court ordered preferences for persons in the hourly work force who might have suffered discrimination in promotions,[6] added back pay and front pay for all discriminatees,[7] and ordered Respondent to make future promotions on the basis of specified numerical ratios. Although the court's liability finding was premised upon a comparison with the hourly work force rather than applicants for initial hire, its order required promotions made in accordance with the ratios until such time as the percentage of minorities and females in higher level positions equalled the percentage of minorities and females in the applicant pool for hiring for the preceding four (4) years.[8]

The Fourth Circuit reversed virtually all of the district court's findings. As none of the named plantiffs

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[5] Specific evidence on this issue included:

a) The parties' stipulations that the skills and experience required for promotion are normally acquired through experience in hourly and nonsupervisory salaried positions;
b) That from 1965 to the time of trial, promotions in both facilities were uniformly made to more experienced employees, with the result that in the Service Center facility promotees had an average of 15.3 years of experience, while in Installation promotees had an average of 14.8 years of experience;
c) That no employee was promoted to supervisor in the Service Center with less than six years of experience, and no employee was promoted to supervisor in Installation with less than eight years of experience.

While Petitioners correctly state that no specific amount of experience was a prerequisite for promotion (Petition, at 25-26), it is clear that experience was in fact a prime determinant in promotion decisions during the period.

[6] Appendix to Petition, at 95a.

[7] Appendix to Petition, at 92a-95a.

[8] Appendix to Petition, at 98a-100a. Once again, no specified time limit for such promotions was established.

had suffered discrimination in hiring,[9] the Fourth Circuit found that their interests in potentially discriminatory job assignment, transfer or promotion policies were not the same as the interests of rejected applicants in the hiring process. On the basis of this Court's ruling in *East Texas Motor Freight, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977) that named plaintiffs must "possess the same interests and suffer the same injury" as class members they seek to represent, the Fourth Circuit held it was error to allow the named plaintiffs to represent rejected applicants. The Fourth Circuit thus vacated the district court's opinion regarding discrimination in hiring.[10]

The Fourth Circuit further held that plaintiffs had failed to establish a *prima facie* case of discrimination in promotions. The court found that plaintiffs' proof of disparate impact, which consisted solely of a percentage comparison between all minorities and females in the hourly work forces with the percentages of minority and females promoted, was insufficient in light of Respondent's proof that promotions were uniformly made to more experienced employees.[11] In light of the uncontroverted and stipulated evidence on this point, the Fourth Circuit refused to presume that all hourly employees were equally qualified for promotions. As plaintiffs had totally failed to present any statistical comparisons based upon a pool of skilled or experienced hourly employees who were presumptively qualified for

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[9] The Fourth Circuit found that plaintiff Marable's claim of hiring discrimination was totally invalid as there was no clerical vacancy between the time she applied for employment and the date she was hired. Appendix to Petition, at 3a, note 1. A further discussion of Marable's status is found *infra*, text accompanying notes 17-22.

[10] The Fourth Circuit did not have to consider the merits of the district court's findings on discrimination in hiring, or the propriety of the court's remedial decree.

[11] *See* note 5, *supra*.

promotion,[12] the Fourth Circuit held that plaintiffs had failed to prove disparate impact and dismissed the promotion claim.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Fourth Circuit correctly applied *East Texas Motor Freight, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977) to find that the named plantiffs could not represent rejected applicants. None of the named plaintiffs was refused employment, and thus none of the named plaintiffs suffered the same injury, possessed the same interests, or could be members of a class of rejected applicants. The decision below is in harmony with the only two circuit court decisions since *Rodriguez* dealing with this issue,[13] and is supported by a substantial body of case law establishing that present and former employees may not represent rejected applicants under the commonality, typicality, and adequacy requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

Petitioners' claim that plaintiff Marable was a rejected applicant is completely without merit. Petitioners' present contention is directly contrary to the position they took at the time the class was certified. Moreover, Marable's claim was plainly untimely as she was hired in 1966 but made no complaint of discrimination in employment until 1973. This Court's decision in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977) establishes

[12] At no time did the Fourth Circuit require plaintiffs to anticipate or prove "what job-related skills would be" (Petition, at 7). The Fourth Circuit merely held that plaintiffs' sole method of proof was insufficient to create a presumption of discrimination as it failed to take experience or job skills into account in any way.

[13] *Scott* v. *University of Delaware*, 19 Fair Empl. Prac. Cas. 1730 (3d Cir. 1979); *Chavez* v. *Tempe Union High School District*, 565 F.2d 1087 (9th Cir. 1977).

that such a moribund claim has no present legal consequences. Finally, even if her claim were to be considered timely, her failure to allege or prove a vacancy precludes her hiring claim from serving as the basis for class representation.

The court below was also correct in refusing to allow the named plaintiffs to raise allegations of sex discrimination at the Installation facility. The Installation and Service Center facilities are distinct and separate employing entities, and neither of the female named plaintiffs was employed in the Installation facility.

The Fourth Circuit's ruling that Petitioners had failed to present a *prima facie* case of discrimination in promotions is also correct and does not conflict with other circuit court rulings. The court below properly considered Respondent's proof that promotions were uniformly made to more experienced employees in the context of Petitioners' proof of disparate impact. For these more highly skilled positions, the Fourth Circuit held that statistical proof that failed to take skills, experience or qualifications into account in any way was insufficient to raise a presumption of illegal conduct. This decision did not require Petitioners to anticipate or prove that they were qualified, but rather to adduce some evidence beyond a mere gross statistical comparison with the entire hourly work force. This ruling is well supported by numerous circuit court decisions requiring plaintiffs to prove that their statistical proof reflects a relevant qualified labor market.

I. THE FOURTH CIRCUIT CORRECTLY HELD THAT PETITIONERS, WHO HAD NOT SUFFERED ANY DISCRIMINATION IN HIRING, COULD NOT REPRESENT REJECTED APPLICANTS.

A. The Fourth Circuit's Decision is in Harmony With This Court's Decision in *East Texas Motor Freight, Inc.* v. *Rodriguez* and With Circuit Court Decisions Interpreting *Rodriguez.*

The Fourth Circuit's decision correctly applies this Court's decision in *East Texas Motor Freight, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977). *Rodriguez* establishes that class representatives must both be part of the class they seek to represent and "possess the same interest and suffer the same injury as the class members." 431 U.S. at 403. In *Rodriguez*, this Court held that the named plaintiffs could not represent a class of applicants for certain driving positions because they were not qualified for such jobs and thus had personally suffered no "injury" from the alleged discriminatory practices. Similarly, in the present case, the Fourth Circuit found that Petitioners, all of whom had been hired and none of whom had suffered discrimination in initial hire, did not possess the "same interest" and had not suffered the "same injury" as rejected applicants alleging a discriminatory refusal to hire. The court therefore correctly concluded that the petitioners were not proper representatives of a class of applicants under the two-part test employed in *Rodriguez*.[14]

Moreover, the Fourth Circuit's decision is consistent with circuit court decisions interpreting *Rodriguez*. Only two other Circuits, the Third and Ninth, have addressed

[14] Petitioners allege that the Fourth Circuit enunciated a *per se* rule based upon its interpretation of *Rodriguez*. No statements to this effect are found in the decision below, which appears to resolve this question on the basis of the record in this case rather than to finally determine a question of law applicable to all class actions.

the issue of employee representation of rejected applicants since this Court's decision in *Rodriguez*,[15] and in both cases the results are consistent with the Fourth Circuit's decision in this case. The Third Circuit in *Scott* v. *University of Delaware*, 19 Fair Empl. Prac. Cas. 1730 (3d Cir. 1979), held that an employee who had not suffered any discrimination in hiring could not properly represent a class of unsuccessful applicants. The court based its decision both on the lack of typicality of plaintiff's claim that he was discharged on the basis of race with the hiring claims of the applicant class, and on inadequacy of representation because the interests of the named plaintiff in continued employment and the interests of the applicant class were in conflict. The court also noted that because the named plaintiff was not discriminated against in initial hiring, he would not satisfy the "same interest, same injury" test of *Rodriguez*.[16]

[15] Neither of the post-*Rodriguez* decisions cited by Petitioners conflicts with the Fourth Circuit's decision. Petitioners cite the Eighth Circuit case of *United States Fidelity & Guaranty Co.* v. *Lord*, 585 F.2d 860 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 1228 (1979), for the proposition that the certification of a class including both applicants and employees did not constitute an abuse of discretion. However, this issue was never even considered by the court. The case was brought to the court on a petition for a writ of mandamus to limit the geographic scope of the class to a single state. The court dealt solely with the geographic scope question; it never reached the employee-applicant issue.

Similar problems are presented by Petitioners' citation of *Satterwhite* v. *City of Greenville*, 578 F.2d 987 (5th Cir. 1978), as reaffirming the holding in *Long* v. *Sapp*, 502 F.2d 34 (5th Cir. 1974), that a former employee could represent a class including unsuccessful applicants. *Long* is cited in *Satterwhite* for the proposition that a named plaintiff's failure on his or her individual claim does not necessarily moot the class action. 578 F.2d at 933, n.8. *Satterwhite's* holding on this point does not conflict with the Fourth Circuit's decision in this case. The Fifth Circuit's further dicta in *Satterwhite* suggesting a narrow interpretation of *Rodriguez* does not present a conflict in the circuits meriting this Court's attention.

[16] 19 Fair Empl. Prac. Cas. at 1738.

Similarly, the Ninth Circuit, in *Chavez* v. *Tempe Union High School District*, 565 F.2d 1087 (9th Cir. 1977), held that an employee who had suffered no discrimination in initial hiring lacked standing in a Title VII case to raise a claim premised on perpetuation of past hiring discrimination. 565 F.2d at 1094, n.10. Again, the court's decision was based upon this Court's decision in *Rodriguez*.[17]

In addition, the Sixth Circuit, in *EEOC* v. *Detroit Edison*, 515 F.2d 301, *vacated and remanded on other grounds*, 431 U.S. 951 (1977), held that current employees could not represent a class of rejected applicants because they could not meet the adequacy requirements of Fed. R. Civ. P. 23(a)(4). The Sixth Circuit anticipated this Court's decision in *Rodriguez* when it concluded that rejected applicants could only be represented by individual plaintiffs who had "interests in common" with the class. 515 F.2d at 311.

The Fourth Circuit's decision is thus in conformity with this Court's decision in *Rodriguez* and with the decisions of the Third, Ninth and Sixth Circuits. The cases cited by the petitioners to support the existence of a conflict between circuits are either inapposite or of no continuing validity in view of *Rodriguez*.

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[17] The 1976 decision on standing cited by petitioners, *Gray* v. *Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976), does not conflict with the Fourth Circuit's decision. The plaintiff in *Gray* achieved standing by alleging a personal work environment injury caused by defendant's hiring practices. Petitioners have alleged no such personal injury, and could not have gained standing even under the standard of *Gray*. 545 F.2d at 175, n.16. Further, *Gray* addressed only the question of Article III standing; the plaintiffs had yet to pass muster under Fed. R. Civ. P. 23. 545 F.2d at 176-77. Finally, the continuing validity of the *Gray* decision is doubtful because it was decided before this Court handed down its decision in *Rodriguez*, and appears to embrace a far broader standing doctrine than enunciated by this Court.

Indeed, in tacit recognition that the Fourth Circuit's interpretation of *Rodriguez* is correct, Petitioners have claimed that one of the named plaintiffs, Marable, was in fact a rejected applicant. This claim is specifically contrary to the position that Petitioners took at the time the class was certified, when they assured the trial judge that none of the named plaintiffs was a rejected applicant. More important, any claim that Marable might make with regard to hiring was completely time-barred. Marable originally applied for employment on April 23, 1966; was hired on May 10, 1966; first filed an employment discrimination charge on May 20, 1973; and filed this lawsuit on May 14, 1975.[18] This Court has ruled in *United Air Lines, Inc.* v. *Evans*,[19] that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."[20] Even had Marable suffered some form of hiring injury, her claim was barred by the statute of limitations and had "no present legal consequences."[21]

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[18] Stipulations, paragraph 221, 224, 231 (Appendix 135-136, 141).

[19] 431 U.S. 553 (1977).

[20] 431 U.S. at 558.

[21] *Id.* In 1966, Title VII required that an administrative charge of discrimination be filed within ninety (90) days of the alleged illegal act, a period that was extended in 1972 to 180 days by Congress in the Equal Employment Opportunity Act. *See Legislative History of the Equal Employment Act of 1972* (Committee Print) at 1846. The appropriate state statute of limitations for purposes of 42 U.S.C. § 1981 requires a lawsuit to be brought within two (2) years of the alleged illegal act. Virginia Code § 8-24 as applied in *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 275 (4th Cir.), *cert. denied sub nom., American Tobacco Co.* v. *Patterson*, 429 U.S. 920 (1976).

Finally, Marable's hiring claim was legally deficient, even if it could have been considered timely, due to her failure to allege or prove the existence of a vacancy. Both the district court (Appendix to Petition at 67a, paragraph 102) and the Fourth Circuit (Appendix to Petition at 3a, note 1) found that Marable had applied for employment as a clerk-typist. Yet as the Fourth Circuit notes (Appendix to Petition, at 3a, note 1), no clerk-typist was hired prior to Marable's hire. This failure to allege or prove a vacancy establishes that Marable neither alleged nor proved a *prima facie* case of discrimination.[22]

In light of the record regarding Marable, Petitioners err completely by characterizing this case as inconsistent with cases holding that a properly certified class action may proceed although the named representative's claim upon which it was based has failed. In this case, there was absolutely no foundation to Marable's claim *ab initio*. No court is required to certify a class on the basis of claims that are clearly untimely and do not even rise to the level of a colorable claim of discrimination.[23]

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[22] *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

[23] Petitioners' further claim that this case is distinguishable from *Rodriguez* in that the hiring claims in this case were pursued to judgment is not persuasive. This Court held, in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), that class certification decisions are not subject to interlocutory appeals and must be reviewed only after judgment on the merits. If Petitioners are correct in arguing that juridical invulnerability attaches to class claims upon entry of judgment, there can never be appellate review of the merits of the certification decision. Yet *Coopers & Lybrand, supra*, is "predicated upon the concept that full and effective review is available after a final judgment on the merits" (*Satterwhite* v. *City of Greenville*, 578 F.2d 987, 1000 (5th Cir. 1978)), a concept that Petitioners would prefer to avoid in this case. That full and effective appellate review, which this Court has held available to both plaintiffs and defendants, *Coopers & Lybrand, supra*, 437 U.S. at 476-77, destroys Petitioners' alleged distinction of *Rodriguez*.

B. The Fourth Circuit's Decision is Consistent With Judicial Interpretation of Rule 23 of the Federal Rules of Civil Procedure.

Further support for the Fourth Circuit's decision is found in numerous lower court decisions holding that employees are not proper representatives of rejected applicant classes under the specific Fed. R. Civ. P. 23(a)(2), (3) and (4) requirements of commonality, typicality and adequacy.[24]

The lack of commonality and typicality in the present case is revealed in the divergence between the promotion and job assignment claims of the petitioners and the hiring claims of the class of rejected applicants. The challenge to Respondent's hiring practices raised complex factual and legal issues concerning the impact and validity of tests and other hiring criteria that are totally unrelated to the Petitioners' individual allegations. Petitioners' own statistical comparisons utilize totally different universes for hiring and promotion, again underscoring the dissimilarity of the claims themselves. Petitioners' attempt to characterize the hiring and promotion claims included in the case as aspects of one single employment practice is the very type of over-broad generalization prohibited by *Rodriguez's* mandate of "careful attention" to the specific requirements of Fed. R. Civ. P. 23. 431 U.S. at 405-06.

The representation of rejected applicants by Petitioners also raises serious questions of adequacy of representa-

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[24] *See, e.g., Lightfoot* v. *Gallo Sales Co.*, 15 Fair Empl. Prac. Cas. 615, 619-20 (N.D. Cal. 1977) (holding that plaintiff-employees could not represent a subclass of rejected applicants because they failed to meet the requirements of Rule 23(a)(2) and (3)); *Williams* v. *Wallace Silversmiths, Inc.*, 75 F.R.D. 633, 635 (D. Conn. 1976) (same); *Robbins* v. *O'Brien Corp.*, 14 Fair Empl. Prac. Cas. 934, 935 (N.D. Cal. 1977) (same, on typicality grounds); and *Gill* v. *Monroe County Dept. of Social Services*, 79 F.R.D. 316 (W.D.N.Y. 1978) (same, on adequacy grounds).

tion.[25] A number of courts, including the Third Circuit in *Scott* v. *University of Delaware, supra*, have held that employees are inadequate representatives of rejected applicants because of inherent conflicts over the types of relief sought. Relief to rejected applicants in the form of retroactive seniority, promotion and hiring "preferences," as ordered by the trial court in the present case, could serve to displace the employee class representatives.[26] Moreover, the time span covered by the class in the present case predates each of the Petitioners' initial dates of hire, thus creating a serious risk of conflict.[27] The district court recognized this risk and in its initial certification order the court refused to include rejected applicants in the class, only to erroneously reverse itself thereafter. The Fourth Circuit made no similar error when it ruled the plaintiffs shared no injury or common interests with rejected applicants.

II. THE FOURTH CIRCUIT PROPERLY HELD THAT THE NAMED PLAINTIFFS COULD NOT REPRESENT A CLASS ALLEGING SEX DISCRIMINATION IN THE INSTALLATION FACILITY.

Under *Rodriguez*, the named female plaintiffs could represent a class of women alleging sex discrimination at the Installation facility only if they were members of such a class. The only two named female plaintiffs, Marable and Carter, were not employed at the Installa-

[25] Contrary to Petitioners' assertions, challenges to the adequacy of representation were made in the Fourth Circuit.

[26] In *Scott*, the Third Circuit concluded that the interests of the named representative, a faculty member whose contract was subject to renewal, and the interests of a class of applicants for positions on the faculty, were "necessarily" in conflict. 19 Fair Empl. Prac. Cas. at 1737.

[27] Petitioners also recognize this conflict. In their petition they stress the fact that applicants directly "competed" with the named plaintiff who sought to transfer to another job. (Petition, pp. 8-9.)

tion facility, and on this basis the Fourth Circuit properly held that their employment at the Service Center facility did not allow them to challenge the employment practices of a separate employing entity.

Courts considering the issue have held that class certification must be based upon "[s]uch factors as geographical dispersion, diversity of employment, work activities, or individual class members' characteristics, . . . and decentralized or disuniform administration of personnel policies. . . ." *Wofford* v. *Safeway Stores*, 78 F.R.D. 460 (N.D. Cal. 1978). Thus, federal courts have consistently held that named plaintiffs may not represent employees whose jobs require skills or qualifications markedly different from their own,[28] or whose conditions of employment are different due to membership in a different collective bargaining unit or union local,[29] or who are not subject to a single, uniform personnel policy.[30]

[28] *Lewis* v. *Methodist Hospital*, 17 Empl. Prac. Dec. ¶ 8601 (S.D. Tex. 1978) (licensed vocational nurse could not represent registered nurses); *Webb* v. *Westinghouse Electric Corp.*, 78 F.R.D. 645 (E.D. Pa. 1978) (production and maintenance workers could not represent salaried employees); *Rowinski* v. *Vaughan*, 77 F.R.D. 406 (D.D.C. 1977) (professionals could not represent clericals).

[29] *Buckner* v. *Cameron Iron Workers*, 18 Fair Empl. Prac. Cas. 1482 (S.D. Tex. 1978); *Markey* v. *Tenneco Oil Co.*, 439 F. Supp. 219 (E.D. La. 1977); *Ford* v. *U.S. Steel Corp.*, 17 Fair Empl. Prac. Cas. 940 (N.D. Ala. 1977).

[30] *Rosendaul* v. *Garrett Freightlines*, 19 Fair Empl. Prac. Cas. 881 (D. Idaho 1979); *Aungst* v. *J. C. Penney Co.*, 456 F. Supp. 370 (W.D. Pa. 1978); *Droughn* v. *FMC Corp.*, 74 F.R.D. 639 (E.D. Pa. 1977). *Califano* v. *Yamasaki*, 99 S. Ct. 2545 (1979), which Petitioners contend permits certification of a nationwide class, is simply inapposite. That case did not involve employment discrimination and therefore did not concern itself with the effect of decentralized personnel policies on class certification. Rather, plaintiffs in *Yamasaki* presented only a single issue of law—whether a hearing is required prior to recoupment of Social Security overpayments—"applicable in the same manner to each member of the class." 99 S. Ct. at 2557.

Thus, whether the propriety of the named plaintiffs' representation of a particular class is deemed a matter of standing—as the *Rodriguez* Court's reliance on *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), implies—or rather depends only upon satisfaction of Rule 23's typicality, commonality and adequacy requirements, the presence of the factors listed in *Wofford*, *supra*, may vitiate the "nexus" that must exist between the representatives and the purported class. *E.g.*, *Hannigan* v. *Aydin Corp.*, 76 F.R.D. 502 (E.D. Pa. 1977).[31] The record below demonstrates just such a series of marked differences between the two Western Electric facilities, and therefore the Fourth Circuit was correct in holding that plaintiffs Marable and Carter were not members of a class subject to the employment policies of the Installation facility.

The Installation District is one of three parts of an Installation "Area" headquartered in Towson, Maryland. None of the District's employees (save six administrative employees) work in the Arlington office; unlike the employees of the Service Center, installation work is performed "in the field." Service Center and Installation employees are covered by different collective bargaining agreements; are members of separate union locals, and use separate grievance and arbitration procedures. The

[31] Even before the Court's decision in *Rodriguez*, the lower courts had held the requirements of Rule 23 unsatisfied in cases in which these factors were present. *E.g.*, *Wells* v. *Ramsay, Scarlett and Co.*, 506 F.2d 436 (5th Cir. 1975) (foreman could not represent longshoremen); *Parker* v. *Kroger Co.*, 14 Fair Empl. Prac. Cas. 75 (N.D. Ga. 1976) (bargaining unit members could not represent nonmembers; class limited to geographical "zone"); *Sanday* v. *Carnegie-Mellon University*, 17 Fair Empl. Prac. Cas. 562 (W.D. Pa. 1976) (faculty hiring, salary, promotion, and tenure decisions made by individual department heads and deans). Petitioners do not contend that the Fourth Circuit's decision conflicts with the decisions of any other circuit on this question.

work of the Service Center employees involves assembly, repair, maintenance, or clerical functions; installers must develop sophisticated electronic knowledge and skills. There is no interaction or interdependence between the personnel of the two facilities.

The sole connection between the Service Center and Installation, Washington District, is that the latter rents a small portion of the former's physical plant. However, mere geographical proximity, standing alone, cannot equate the two facilities for purposes of class certification, *Patterson* v. *American Tobacco Co.*, *supra*, especially when the two groups of employees have totally different job duties and are drawn from different labor markets, *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied sub nom.*, *American Tobacco Co.* v. *Russell*, 425 U.S. 935 (1976).[32]

III. THE FOURTH CIRCUIT'S RULING ON DISCRIMINATION IN PROMOTIONS IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND WITH RELEVANT RULINGS OF LOWER COURTS.

A. The Fourth Circuit's Ruling On Promotions Correctly Applies Established Principles Regarding The Burden Of Proof In Employment Discrimination Cases.

Contrary to Petitioners' assertions, the Fourth Circuit neither departed from prior precedent nor imposed an unreasonable burden of proof upon them by ruling that no *prima facie* case of discrimination in promotions was

[32] Indeed, even the district court recognized that the Installation and Service Center facilities were distinct with regard to all issues save initial hiring. Appendix to Petition, at 29a.

presented in this case. Unlike the district court, the Fourth Circuit evaluated all of the evidence in the record—including that offered by Respondent as well as that offered by Petitioners—to determine that Petitioners had not carried their burden of proving that the promotion process had a disparate impact upon minorities and females. In particular, the court below relied heavily upon the following evidence:

1. The parties' stipulations that the skills and experience required for promotion are normally acquired through experience in hourly and non-supervisory salaried positions (App. 115, 118);
2. That from 1965 through the time of trial, promotions in both facilities were uniformly made to more experienced employees, with the result that in the Service Center promotees had an average of 15.3 years of experience, while in Installation promotees had an average of 14.8 years of experience (App. 643, 696);
3. That no employee was promoted to supervisor in the Service Center with less than six years of experience, and no employee was promoted to supervisor in Installation with less than eight years of experience (App. 643, 646).

On the basis of this evidence, the court determined that not all hourly employees could be deemed equally qualified for promotion. The court thus held that Petitioners' proof of disparate impact, which was based exclusively upon a comparison of the total percentage of all minority and female employees in the hourly work force without regard to experience, did not amount to *prima facie* proof of disparate impact.

The Fourth Circuit properly considered Respondent's evidence in determining whether Petitioners had shown a *prima facie* case of disparate impact. This Court has

repeatedly held that plaintiffs bear the burden of proof in employment discrimination cases,[33] and that employers are entitled to attack statistics, and the inferences to be drawn from statistics, offered as evidence of disparate impact. *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 339-41, 360-61; *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 330; *and see Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 337-39 (Rehnquist, J. concurring); *Hazelwood School District* v. *United States*, *supra*, 433 U.S. at 314 n.1, 319 n.8 (Stevens, J. dissenting).[34] There can be no doubt that Respondent's evidence was properly considered in the context of Petitioners' *prima facie* case.[35]

Moreover, Respondent's evidence established that the underlying premise of Petitioner's statistical proof—

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[33] *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 576-78 (1978); *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-09 (1977); *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 334-41 (1977); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 137, n.14 (1976).

[34] Indeed, Justice Stevens' dissent in *Hazelwood* was based on the employer's failure to supply rebuttal evidence to contradict the government's *prima facie* case.

[35] Numerous lower courts have similarly held that a *prima facie* case must be judged on the basis of the record as a whole, and that an employer's evidence may bear on the existence of *prima facie* proof. *See, e.g., Whack* v. *Peabody & Wind Engineering Co.*, 595 F.2d 190 (3d Cir. 1979); *Roman* v. *ESB, Inc.*, 550 F.2d 1343, 1350 (4th Cir. 1976); *EEOC* v. *Datapoint Corp.*, 570 F.2d 1264, 1268-69 (5th Cir. 1978); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Henry* v. *Ford Motor Co.*, 553 F.2d 46, 48-49 (8th Cir. 1977); *Mosby* v. *Webster College*, 563 F.2d 901 (8th Cir. 1977); *Dickerson* v. *United States Steel Corp.*, 439 F. Supp. 55 (E.D. Pa. 1977); *EEOC* v. *duPont Co.*, 445 F. Supp. 223 (D. Del. 1978); *see generally* Schlei and Grossman, *Employment Discrimination*, at 1159-60, 1196 (1976). In light of this pervasive authority, the district court and Judge Lay were guilty, in their words, of a "fundamental misconception" in failing to consider Respondent's evidence in the context of Petitioner's *prima facie* case.

that all hourly employees were equally qualified for promotion—was inaccurate. This Court has repeatedly emphasized that statistical proof must, in cases involving skilled jobs, define the relevant labor market in light of the prerequisites for the job.[36] On this basis, numerous courts have dismissed employment discrimination claims for failure to prove disparate impact where plaintiffs failed to show the proportion of the work force possessing the skills required for the job.[37] In particular, a substantial number of courts, in promotion cases nearly identical to the instant case, have held that plaintiffs are required to supply proof of a sufficiently skilled population upon which to base a comparison. For example, in *EEOC* v. *Chesapeake & Ohio Railway Co., supra, EEOC* v. *United Virginia Bank, supra,* and *Roman* v. *ESB, Inc., supra,* the Fourth Circuit refused to find a *prima facie* case of discrimination in promotions where plaintiffs sup-

[36] *Hazelwood School District* v. *United States, supra,* 433 U.S. at 308-11; *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 339-40 n.20; *Mayor of the City of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620-21 (1974).

[37] *See, e.g., Townsend* v. *Nassau County Medical Center,* 558 F.2d 117 (2d Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978); *EEOC* v. *Chesapeake & Ohio Railway Co.,* 557 F.2d 229 (4th Cir. 1978); *White* v. *Carolina Paperboard Corp.,* 564 F.2d 1073 (4th Cir. 1977); *EEOC* v. *United Virginia Bank,* 555 F.2d 403 (4th Cir. 1977); *Roman* v. *ESB, Inc., supra; United States* v. *Jacksonville Terminal, Co.,* 451 F.2d 418 (5th Cir. 1971), *cert. denied sub nom., Brotherhood of Locomotive Engineers* v. *United States,* 406 U.S. 906 (1972); *Miller* v. *Weber,* 577 F.2d 75 (8th Cir. 1978); *Pack* v. *Energy Research and Development Administration,* 566 F.2d 1111 (9th Cir. 1977); *Edmonds* v. *Southern Pacific Transportation Co.,* 19 Fair Empl. Prac. Cas. 1052 (N.D. Cal. 1979); *Movement for Opportunity* v. *Detroit Diesel,* 18 Fair Emp. Prac. Cas. 557 (S.D. Ind. 1978); *Neloms* v. *Southwestern Electric Power Co.,* 440 F. Supp. 1353 (W.D. La. 1977); *Markey* v. *Tenneco Oil Co., supra; Frink* v. *U.S. Navy,* 16 Fair Empl. Prac. Cas. 67 (E.D. Pa. 1977); *Agarwal* v. *Arthur G. McKee & Co.,* 19 Fair Empl. Prac. Cas. 503 (N.D. Cal. 1977); *Croker* v. *Boeing,* 437 F. Supp. 1138 (E.D. Pa. 1977); *EEOC* v. *DuPont Co., supra; Dobbins* v. *Local 212, IBEW,* 292 F. Supp. 413 (S.D. Ohio 1968).

plied no proof that hourly employees were qualified for the positions based on job performance, skill and dependability. Similar decisions are found in the Fifth Circuit,[38] the Ninth Circuit[39] and in numerous district courts.[40]

These cases stand for one central proposition—that where jobs require specialized skills, qualifications or experience, plaintiffs may not rest their *prima facie* case upon statistical proof that fails to take experience and skills into account.[41] Petitioners' entire proof of disparate impact herein rested upon the assumption that all hourly employees were equally qualified, and in light of the pervasive authority quoted above this proof was properly rejected by the Fourth Circuit. As this Court has previously stated, *prima facie* proof of discrimination depends on presentation of evidence justifying, absent further explanation, an inference of illegal conduct.[42]

[38] *United States* v. *Jacksonville Terminal Co., supra,* 451 F.2d at 445-46.

[39] *Pack* v. *Energy Research & Development Administration, supra,* 566 F.2d at 1113.

[40] *Lee* v. *City of Richmond,* 456 F. Supp. 756 (E.D. Va. 1978); *Markey* v. *Tenneco Oil Co., supra; Agarwal* v. *Arthur G. McKee & Co., supra; Croker* v. *Boeing, supra; EEOC* v. *duPont Co., supra.*

[41] Scholarly commentary further supports the decision below. *See, e.g.,* Gwartney, Asher, Haworth & Haworth, *Statistics, The Law and Title VII: An Economist's View,* 54 N.D. Lawyer 633, 644-47 (1979); *Note: Employment Testing: The Aftermath of Griggs* v. *Duke Power Company,* 72 Colum. L. Rev. 900, 911 (1972); *Note: Employment Discrimination: Statistics and Preferences Under Title VII,* 59 Va. L. Rev. 463, 474 (1973).

[42] *Furnco Construction Corp.* v. *Waters, supra,* 438 U.S. at 576-78. Petitioners' further claim that the decision below conflicts with circuit court authority overturning promotion systems based upon subjective judgments (Petition, at 24) overlooks the central question in those cases. It was not the subjectivity of the procedure that was in issue in those cases, but whether the procedure had a disparate impact upon the employment opportunities of females and minorities. As the Eighth Circuit stated in *Rogers* v. *Interna-*

Here, Petitioners failed to present such proof by failing to compare equally experienced or skilled personnel.

B. The Fourth Circuit Neither Applied An Erroneous Legal Standard Nor Improperly Relied Upon Population Statistics.

Petitioners' claim that the Fourth Circuit improperly applied the burden of proof standards enunciated in *McDonnell-Douglas Corp.* v. *Green, supra,* must fail for two reasons. First, in its opinion the Fourth Circuit never states that it is relying upon the *McDonnell-Douglas* standards; indeed, at no point in its opinion does it ever refer to that case. Petitioners' claim that the court below applied these standards to this case thus rests upon the implications they choose to draw from the Fourth Circuit's ruling, rather than the decision itself.

Second, neither this Court nor the courts of appeals have ever held that the *McDonnell-Douglas* standards are of no relevance in a disparate impact case. In fact, in *Furnco Construction Corp.* v. *Waters, supra,* this Court discussed the *McDonnell-Douglas* standards and their general applicability:

> But *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based

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tional Paper Co., 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded on other issues,* 423 U.S. 809 (1975):

> "[Subjective criteria] are not to be condemned as unlawful per se, for in all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards alone."

Thus, only if disparate impact had been found would the decision below conflict with the cases relied upon by Petitioners.

> on a discriminatory criterion illegal under the Act.' *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S., at 358, 97 S.Ct., at 1866. See also *id.,* at 335 n. 15, 97 S.Ct., at 1854.
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> . . . .
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> . . . A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. *See International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S., at 358 n. 44, 97 S.Ct., at 1866. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

438 U.S. at 576-77. This Court's citation of *Teamsters* throughout this discussion implies that the general principle of *McDonnell-Douglas*—that a plaintiff must adduce facts sufficient to support an inference of illegal conduct—is a principle of general applicability. Whether or not a plaintiff must, in every disparate impact case, prove qualifications is not in question in this case. What is in question is whether Petitioners in this case, in light of the stipulated uncontroverted evidence regarding the role of experience in the promotional process, were entitled to a judicial presumption that all hourly employees were equally qualified for promotion. The Fourth Circuit plainly did not err in refusing to indulge Petitioners in this presumption.

Neither did the Fourth Circuit err in relying upon census statistics garnered from the Washington, D.C. Standard Metropolitan Statistical Area (SMSA) in its decision. Petitioners' protestations to the contrary, neither this Court nor the lower courts have ruled that work force statistics are always preferable to SMSA statistics. This Court expressly stated in *Dothard* v. *Rawlinson,*

supra, that "there is no requirement, however, that a statistical showing of disproportionate impact must always be based upon analysis of the characteristics of actual applicants." 433 U.S. at 330. Indeed, in *Dothard*, this Court found that a *prima facie* showing of disparate impact in hiring was properly founded upon SMSA data rather than applicant flow statistics, while in *Hazelwood School District* v. *United States*, *supra*, this Court remanded to the trial court because it was not satisfied that SMSA statistics were an accurate enough measure of actual applicant availability. 433 U.S. at 310-11. As this Court stated in *International Brotherhood of Teamsters* v. *United States*, *supra*:

> We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. See, *e.g.*, *Hester* v. *Southern R. Co.*, 497 F.2d 1374, 1379-1381 (CA5).

431 U.S. at 340. Those surrounding facts and circumstances will, in each case, determine whether applicant flow, SMSA or some other form of data is relevant and appropriate. On this basis, numerous lower courts have referred to SMSA rather than work force statistics in disparate impact cases.[44] While Petitioners cite a number of contrary cases, these cases by no means establish that reliance upon work force statistics is mandatory in all promotion cases.

Moreover, Petitioners' claim that the Fourth Circuit found SMSA statistics more appropriate than work force statistics mischaracterizes the decision below. The Fourth

[44] *See, e.g., Robinson* v. *Union Carbide Corp.*, 538 F.2d 652 (5th Cir. 1976); *Jones* v. *Tri-County Electric Cooperative*, 512 F.2d 1 (5th Cir. 1975); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978).

Circuit did not rule that SMSA statistics were more appropriate than work force statistics in this case. Rather, the court below properly found Petitioners' statistical proof unpersuasive, and referred to SMSA statistics because they were the only competent statistics remaining in the record. SMSA statistics were highly supportive of Respondent's position as they proved that minorities and females were promoted to supervisory positions in excess of their percentage in such positions in the SMSA. While these statistics supported the Fourth Circuit's refusal to find that Petitioners had proved a *prima facie* case, it was Petitioners' failure to supply adequate statistical proof, rather than a rejection of work force data in favor of SMSA statistics, that formed the *ratio decidendi* below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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